

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 16, 2007 Session

**MICHAEL and SHERRY CLAWSON, individually and as the parents and  
next of kin of RACHEL M. CLAWSON, deceased, v. MICHAEL L.  
BURROW, individually and d/b/a BURROW MASONRY, and the  
TENNESSEE DEPARTMENT OF TRANSPORTATION, and SUMMERS-  
TAYLOR, INC.**

**Direct Appeal from the Circuit Court for Carter County  
No. C-8896 Hon. Jean Stanley, Circuit Judge**

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**No. E2006-02099-COA-R9-CV - FILED AUGUST 29, 2007**

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HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

**OPINION ON PETITION TO REHEAR**

Appellant (“STI”) has filed a Petition for Rehearing pursuant to T.R.A.P. Rule 39. The Rule provides in pertinent part the following:

Rehearing may be granted by the Supreme Court, Court of Appeals, or Court of Criminal Appeals on its own motion or on petition of a party. In determining whether to grant a rehearing, the following, while neither controlling nor fully measuring the court’s discretion, indicate the character of reasons that will be considered: (1) the court’s opinion incorrectly states the material facts established by the evidence and set forth in the record; . . . (3) the court’s opinion overlooks or misapprehends a material fact or proposition of law; . . .

T.R.A.P. 39(a) (2005).

In support of its Petition for Rehearing, STI contends that the Court incorrectly stated that STI “did not pursue an estoppel theory before the Trial Court.” STI notes that in its Answer to the Clawsons’ Third Amended Complaint it specifically pled estoppel. The relevant portion of STI’s

Answer stated, “Because Plaintiffs [the Clawsons] have recovered workers’ compensation benefits as a result of injuries to the decedent, Summers-Taylor pleads accord and satisfaction, estoppel, election of remedies and waiver as a bar to their claims against it.”

Although STI pled “estoppel” in its Answer, it did not pursue this theory in its “Motion for Summary Judgment Based on the Tennessee Workers’ Compensation Act,” in its Brief in Support of Summary Judgment, or in its Supplemental Motion and Argument in Support of Motion for Summary Judgment. STI’s Motion for summary Judgment and supporting documents presented two alternate theories for summary judgment. First, STI argued that the Clawsons’ acceptance of payments—which STI’s insurer voluntarily paid and labeled as workers’ compensation benefits—triggered the § 50–6–108 exclusivity provision and thereby barred their tort claim, regardless of whether the Decedent’s death occurred in the course and scope of her employment. Second, STI argued that the election of remedies doctrine barred the Clawsons’ tort claim. The doctrines of judicial or equitable estoppel were never discussed. Moreover, during the Circuit Court’s July 10, 2006 motion hearing, STI never mentioned the doctrines of judicial or equitable estoppel. STI’s argument at the hearing consisted of only two theories, i.e., the § 50–6–108 exclusivity provision and the doctrine of election of remedies.

Although STI pled estoppel in its Answer, it never brought this theory to the attention of the Trial Court as a ground for summary judgment. Under these circumstances, consideration of this theory was not appropriate. *See, Griswold v. Income Properties, II*, 880 S.W.2d 672, 678 (Tenn. Ct. App. 1993) (declining to consider a defensive theory pled in the answer but not brought to the trial court’s attention in a subsequent motion for summary judgment).

We respectfully deny STI’s Petition for Rehearing.

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HERSCHEL PICKENS FRANKS, P.J.